STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of Fact-finding Between:

City of Barberton	:	Case No. 2013 MED-10-1335
And	:	Report and Recommendations
Ohio Patrolmen's Benevolent Association	:	Margaret Nancy Johnson

The Ohio Patrolmen's Benevolent Association, hereinafter "OPBA" or "Union," represents all full time police officers employed by the City of Barberton, hereinafter "City." These parties are signatories to a Collective Bargaining Agreement having an expiration date of December 31, 2013. As the parties were unable to reach agreement on a successor contract, the matter came on for hearing on June 26, 2014 in a conference room at the Municipal Building, in Barberton, Ohio.

Pursuant to Ohio Revised Code Section 4117.14(C)(3) the State Employment Relations Board, hereinafter "SERB," appointed Margaret Nancy Johnson to preside as fact-finder. The case for the Union was argued by S. Randall Weltman, Attorney at Law. Also in attendance for the OPBA were Terry Mullenix and Rob Mingle. Paul Jackson, Attorney with the law firm of Roetzel and Andress, presented the position of the City. Michael Kimble, Safety and Human Resources Director, and Vincent Morber, Chief of Police, testified on behalf of the City.

Statement of the Case

In 2010, the City of Barberton and this unit engaged in concessionary bargaining whereby the unit waived a negotiated wage increase as well as a number of bargained benefits so as to prevent lay-offs. Subsequent negotiations included additional concessions as well as a wage freeze for 2011 and 2012, with a reopener for 2013 which resulted in impasse. A fact-finder recommended and the parties ultimately agreed to a 2% increase for 2013.

While the economic context for current negotiations is less dire, the City cites declining income tax revenues (City Exhibit C) to justify its economic proposal on wages. Nonetheless, in the absence of a thorough analysis of municipal revenues and expenditures, the Union asserts that ability to pay is not a matter of dispute in this proceeding. Indeed, rather than a financial disagreement, issues upon which the parties cannot agree pertain more to the inherent tension between managerial authority and job security than to fiscal stability, with the Union asserting managerial proposals require more "consideration" than is offered by the City.

Issues

Two issues were presented to the fact-finder for recommendations: 1) Compensation, including wages, Article 17, and a Letter of Understanding setting forth language on a wellness ("BEAT") program; and 2) contractual language in Section 1.3 of Article 1, Recognition.

Criteria

In issuing the recommendations that follow, the fact-finder has taken into account statutory criteria as enumerated in Ohio Revised Code Section 4117.14, to-wit:

1. Past collectively bargained agreements, if any, between the parties;
2. Comparison of issues submitted to fact-finding relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
3. The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustment on the normal standard of public service;
4. The lawful authority of the public employer;
5. The stipulations of the parties;
6. Such other factors, not confined to those listed, which are normally or traditionally taken into consideration in the determination of contract disputes.

Positions of the Parties

The Union

I. Article 1- Recognition

While the City has pursuant to a 1996 ordinance consistently utilized the services of a "reserve police unit" (Union Exhibit 3), the parties have bargained concerning the function, role, and use of reserve officers. In the 2005-2007 labor agreement, contract language provided the "bargaining unit shall be the exclusive provider of police, patrol and security services for the City of Barberton" (Union Exhibit 5). During negotiations for the 2011-2013 Agreement, rather than eliminating this provision as proposed by the City, the parties agreed upon language set forth in Article 1, Section 1.3, which recognizes the bargaining unit as the "exclusive provider of routine patrol services" but identifies specific functions for which reserve officers may be utilized (Union Exhibit 6).

During the course of the 2011-2013 Agreement, disputes arose over the application and meaning of Section 1.3 resulting in the filing of grievances protesting the "use of reserve officers the same as regular full time bargaining unit officers"(See Union Exhibit 7, 10). While the parties settled one grievance, another is pending arbitration. Consequently, in the course of current contract negotiations, the Union has sought to clarify those instances in which reserve officers may be utilized.

The Union proposes that Section 1.3 read as follows:

> Utilize reserve officers for such functions as prisoner transport, traffic direction, parades, parking enforcement, report writing, surveillance, foot patrol, and other similar functions. Reserve officers will not work a traditional beat alone unless emergency circumstances exist. No reserve officers will be used for the sole purpose of displacing full-time officers.

2. Article 17 – Wages/Letter of Agreement

The Union proposes wage increases of 2.5% for each year of a three year contract. Rationale for the proposal of the Union includes comparable jurisdictions. While the police force has consistently ranked low in terms of compensation, it now ranks at the bottom of comparable jurisdictions (See Union Exhibit 1). Since the City has not demonstrated inability to pay, a reasonable wage adjustment to address both internal and external comparables is appropriate.

City safety forces pay the highest health care contribution in the area. Moreover, these units pay more for health care than service employees represented by AFSCME. While the Union has withdrawn its proposal on insurance, it seeks a wage adjustment that will more adequately compensate its members for their high health insurance costs.

As part of its economic proposal, the City has put forth a letter of understanding in which a Barberton Employee Action Team, or "B.E.A.T." program is established. While the Union does not object to the proposal, it does seek modification of key elements. As presented by the City, the BEAT program establishes two classes of employee: current employees for whom the program is voluntary but for which participating employees receive compensation, and new hires for whom the program is mandatory. The bargaining unit opposes creating a distinction between employees as it adversely affects the cohesion required for effective law enforcement.

Additionally, the Unit objects to language that precludes an employee who misses a fitness test due to injury or illness from taking a makeup test. Such language is unduly restrictive and punitive.

The City

1. Article 1 – Recognition

Advocating for current contract language, the City contends there is no justification for modifying language upon which the parties have bargained. If there is a complaint about the application of the language, then, the appropriate mechanism for resolving such dispute is through the grievance procedures. The Union should abide by language it proposed in the most recent contract negotiations.

The disputed provision provides the City with much needed flexibility in meeting its obligations to the public. Being able to use reserve officers benefits the residents of Barberton without adversely affecting the bargaining unit. No union member has been displaced by a reserve officer. Documentation submitted by the City demonstrates that in 2013 and in 2014 use of reserve officers was limited and the financial obligations incurred thereby minimal (See City Exhibits A and B). Current contract language should be retained.

2. Article 17- Wages/ Letter of Agreement

The City proposes 2% wage increases effective January 1, 2014, January 1, 2015 and January 1, 2016. Percentages offered by the City are comparable to those negotiated by surrounding jurisdictions as well as those granted to other employees. Moreover, the wage proposal is consistent with fiscal constraints confronting the City (See City Exhibit C).

In addition to the 2% wage increase, the City is offering compensation for successful participation in its BEAT program, designed to enhance police response and promote mental and physical fitness in its employees. The City proposal would greatly benefit the unit as well as

the public. As they are consistent with statutory criteria, the wage increase and the BEAT program proposed by the City are appropriate adjustments to the labor agreement.

Discussion

Article 1, Recognition, Section 1.3

In objecting to the Union proposal for a modification of Section 1.3, the City advocates for current contract language. Since the parties just negotiated the provision now disputed by the Union, the City contends there is no reason to amend the collectively bargained term. Moreover, the City posits that any dispute about the application of Section 1.3 is more appropriately addressed through the grievance mechanism established by the parties and that grievances filed by the Union should resolve the dispute.

One problem with the contention of the City is that it presumes contract modification and grievance arbitration to be separate and mutually exclusive remedies. In fact, the Union is justified in both arbitrating a Section 1.3 grievance and also proposing language modification. When implementation of a contractual provision is not consistent with the intent of a bargaining unit, then, addressing that concern by negotiating as well as grieving is appropriate recourse. Failure on the part of the Union to seek a change in contract terms has the potential for being deemed acquiescence to the City interpretation.

Arguing that no Union member has been displaced by any reserve officer, the City further asserts that it has no intent to undermine the bargaining unit. The City points out that it has administered a Civil Service examination with the purpose of adding to the police force. Evidence submitted by the City establishes that reserve officers work minimal hours and cost the City relatively little. As explained in testimony, work performed by the reserve officers is secondary employment.

For the unit member, however, law enforcement is a livelihood and greater job security is an underlying objective of bargaining. The intent of *this* administration may certainly be to use reserve officers so as to free up its police for law enforcement duties. Yet, the only assurance that subsequent administrations are held to the same standard is contract language that clearly and precisely sets forth and restricts the functions and duties performed by reserve officers.

As reserve officers are, by ordinance, certified law enforcement officers, the City argues they have a duty to perform police powers whenever illegal conduct is observed. This obligation is not in dispute. Rather, in contention are those job assignments having a greater likelihood of requiring police action.

The City anecdotally asserts having reserve officers with law enforcement capabilities enhances "the interests and welfare of the public." The purpose of this hearing, however, is to make recommendations based upon facts which support statutory criterion. Except for opinion testimony, nothing in the evidence submitted demonstrates to this fact-finder that the interests and welfare of the public have been better served by the law enforcement capabilities of reserve officers.

Moreover and most significantly, undisputed contractual language upon which the parties have bargained requires that "routine police patrol service" is exclusively unit work. All terms set forth in the Agreement must be consistent with that negotiated commitment and any language which creates an ambiguity or a variance is properly addressed and corrected through bargaining.

The preceding analysis of the language in contention justifies the changes proposed by the Union. Greater precision in specifying the duties to be assigned to reserve officers is warranted. As current contract language has generated a dispute, it is appropriate to remedy the controversy with greater clarity and with language that is consistent with the underlying guarantee that performance of police duties is bargaining unit work.

Specific tasks which the Union claims undermine unit work include traffic control, crowd control, and supplementing a beat car. The term "control" arguably encroaches upon law enforcement authority, and the term "supplementing a beat car" suggests reinforcement rather than support of law enforcement services. To be consistent with the contractual restriction reserve officers should perform less essential, though still important, community and organizational functions. Meaningful use of reserve officers in a variety of civic services can be effective without the inclusion of those disputed terms within the Agreement which give the perception of undermining the bargaining unit.

Accordingly, the fact-finder recommends the following language for Section 1.3 of the Agreement:

> **Utilize reserve police officers for such functions as prisoner transport, traffic direction, parades, parking enforcement, report writing, surveillance, foot patrol, and other similar functions. Reserve officers will not work a traditional beat alone unless emergency circumstances exist. No reserve officers will be used for the sole purpose of displacing full time officers.**

2. Article 17, Wages

a. Percentage increase

The dispute regarding compensation includes both the percentage increase and a new letter of understanding creating a Barberton Employee Action Team (B.E.A.T.) program. Addressing first the issue of the percentage increase, the fact-finder notes the parties differ by .5% for each contract year.

Citing comparable jurisdictions to sustain its 2.5% increase for 2014, 2015, and 2016, the Union contends that of eleven jurisdictions in Summit County with populations greater than 5,500, this police unit ranks lowest in terms of total compensation for twenty year patrolmen (See Union Exhibit 1). In calculating the comparable wage packages the Union has taken into account uniform allowance, shift differentials and longevity. The Union also argues that between 2010 and 2013, this unit fell far below the average percentage wage increase within the state. Finally, pointing out that the City has not engaged in pattern bargaining, the Union contends that its wage proposal is justified by a higher employee contribution to health insurance.

Although the City does not assert inability to pay a wage increase, it argues its proposal is based upon financial constraints and what has been consistent with other employers in the County. Since 2011 tax revenues in the City have declined by 6.08% and the City does not foresee any significant change in the future. While its revenue has declined, the City contends its expenses have increased. Like other public entities, the City argues it must be circumspect in

its wage proposal, and that the 2% increase it has offered is very consistent with the wage increases granted not only in Summit County, but by public employers statewide. Moreover, the City indicates that the monetary incentive for current employees to participate in the EAP and the BEAT programs has a financial value greater than the percentage difference between the two wage proposals.

Financial documentation and testimony in the present proceeding was refreshingly limited. There is no contention that the City lacks the ability to pay a wage increase. The question is how much of an increase is appropriate. Although the Union cites comparable jurisdictions to justify its wage increase, for 2014, the average wage increase for those comparable jurisdictions cited by the Union is less than the 2.5% it now proposes (See Union Exhibit 1). For contract year 2013 in which the Union received a 2% increase, the average wage increase statewide was only 1.47%. The average police increase was 1.66% and the average increase in the Akron area was 1.46%.

The argument of the Union, though, is that wages for this unit have lagged beyond comparable jurisdictions with wage freezes which have caused the unit to fall to the lowest paid of similarly sized cities in Summit County. While the argument is persuasive, the Union also acknowledges that the ranking of the unit has historically been low. Many factors contribute to the "ranking" of jurisdictions in terms of compensation, including demographics, revenue sources, economic enterprise, and so on. Founded as an industrial city, Barberton felt the impact of decline in manufacturing prior to the recent national recession.

Comparison with the top pay for a police officer in Fairlawn, an affluent suburban community with high to mid- end retail accessed by a major interstate highway, distorts the comparative data. Moreover, wage packages consist of various components, including non-economic provisions, and without the entire contract, comparison based upon annual compensation is incomplete.

Since the parties have over many years of bargaining established a reasonable wage for police in comparison to neighboring jurisdictions, a comparable percentage increase is generally used to establish a new wage rate. The percentage increase proposed by the City is more consistent with current trends. With extensive budget cuts implemented by the State and with the severe economic recession experienced nationally, collective bargaining in Ohio has been challenging during the past several years. The Union points out that Barberton has been especially affected by these external factors, and the City contends income revenues continue to remain stagnant. Accordingly, it behooves the parties to be cautious in this round of negotiation. Should some catch-up be appropriate, it can be affected in subsequent negotiations. For current contract terms, however, both internal and external comparables justify the 2% proposed by the City.

As the Union raised the issue of the Barberton Community Foundation some reference thereto is appropriate. Apparently when the City sold a municipal hospital to a private enterprise, it placed the considerable sale proceeds in a Foundation rather than in its operating fund. Such monies are to be dispersed according to specific requirements and protocol. By nature, Foundations are charitable institutions. Mission and intent of the Barberton Community Foundation is to effect improvements in the quality of life for the residents of the City. While there is no evidence in the record that the Foundation could or should underwrite employee wages, the bargaining unit benefits from the services rendered by the Foundation.

The fact-finder recommends a 2% increase effective January 1, 2014; 2% effective January 1, 2015; and 2% effective 2016.

b. BEAT Program

In making the wage recommendation, the fact-finder has considered the monetary incentive proposed by the City which, as it points out, is more than the equivalent of the additional percentage sought by the Union. These incentives would be sums paid to current employees based upon performance in six events designed to assess physical fitness. Recognizing that a component of effective police work is fitness, the Union has not objected to the implementation of the BEAT program. While not opposed to the concept, the Union does challenge certain elements.

The Union argues that the "incentives" should not be restricted to current employees as such provision would stratify the bargaining team. Additionally, the Union contends the incentives should be part of the employee base rate. A final objection on the part of the Union is language which precludes "make-up" testing for the fitness requirements.

As to the stratification argument, the fact-finder notes that distinction between new hires and current employees is not a unique concept. Grandfathering commonly occurs when parties seek to implement a new procedure or to eliminate/reduce a benefit previously granted. The purpose is not to create a tiered labor force but to initiate and introduce new conditions of employment without an adverse effect upon those employees who have bargained for and worked under existing terms. New employees understand the job requirements and benefits at time of hire and there is no expectation of additional compensation for complying with the fitness mandates.

Even so, the neutral finds the language in the side letter somewhat disorganized and greater clarity to avoid future disputes is appropriate. Following the first sentence it should be clearly stated that participation is voluntary for current employees and mandatory for new hires. The fact-finder sets forth language below to replace the second to the last paragraph in the proposed side letter.

Also contrary to common negotiating practice, the Union contention that incentives should be part of the base rate disregards a long standing technique by which employers supplement employee income without the burden of adding to the base rate. Looking at Union Exhibit 1, the comparable jurisdictions cited thereon pay a number of additional benefits which are not part of the base rate but are, nonetheless, income for the employee and contribute to the total monetary package. In law enforcement this practice is not unusual.

Finally, the fact-finder addresses the "make-up" argument. Concern by the City over interference with normal operations is reasonable. On the other hand, precluding employees from participating when physically unable to do so or through no fault of their own seems unduly restrictive. Accordingly, the fact finder recommends deleting language pertaining to make-up and replacing it with language providing a make-up opportunity at a specific time.

The side letter should open as follows:

The City of Barberton shall administer a Cooper test to measure an employee's physical fitness. The parties acknowledge and agree that participation in the fitness testing shall be voluntary for current employees who shall be compensated for participation as set forth below. Physical fitness testing shall be mandatory for any employee hired on or after January 1, 2014. Such employee shall not be entitled to any additional compensation for his/her participation. The parties further agree that such new employees shall not be subject to discipline for the period from January 1, 2014 to December 31, 2016 for failure to meet at the least the 50th percentile for those fitness events.

Such testing shall be administered by the City's Public Safety Director on or about August 1 through September 1 of each year with the involvement of the OPBA steward elected from the City's members of the collective bargaining unit. The test may be scheduled over multiple days to provide opportunity for all members to take part in the test without interfering with normal operations. Makeup testing for employees who are unable to participate due to medical, physical limitation or who are otherwise unable to work regular shifts shall be scheduled between September 1 and September 30 of each year. The test will consist of the following events with the running events alternating each year. The events are:

Other than for the deletion of the second to the last paragraph, the remainder of the Side Letter as proposed by the City is unchanged.

Recommendations

The recommendations of the fact-finder have been set forth in bold above.

Respectfully submitted,

Margaret Nancy Johnson

Service

A copy of these recommendations have been electronically issued this 17th day of July, 2014, to: pjackson@ralaw.com; srwelt@sbcglobal.net; and MED@serb.state.oh.us.